IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1204

STEPHEN EARL SQUIRE,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

JOHN C. LOWE
American Civil Liberties
Union of Virginia
1111 West Main Street
Charlottesville, Virginia 22903

F. GUTHRIE GORDON, III
Lowe and Gordon
1111 West Main Street
Charlottesville, Virginia

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Petitioner

INDEX

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statute Involved 2

Statement of the Case 3

ARGUMENT:

I. 5

II. 7

III. 9

CONCLUSION 12

APPENDIX:

Judgment of the Corporation Court of the City of Charlottesville 1a

Opinion of the Supreme Court of Virginia 2a

CITATIONS

Cases

	Page
Ashe v. Swenson, 397 U.S. 436 (1970)	11
Carlson v. California, 310 U.S. 106, 112 (1940)	5
Chavez v. United States, 250 F. 2d 816 (10th Cir. 1968	7
Coates v. City of Cincinnati, 402 U.S. 611 (1971)	5
Cohen v. California, 403 U.S. 15 (1971)	6, 10
Collins v. City of Norfolk, 186 Va. 1, 41 S.E. 2d 448 (1947)	5
Connally v. General Construction Company, 269 U.S. 384, 391 (1931)	5
Galloway v. Beto, 421 F. 2d 284 (5th Cir. 1970)	11
Gooding v. Wilson, 405 U.S. 518 (1972)	6
Hackney v. Commonwealth, 186 Va. 188, 45 S.E. 2d 41 (1941)	6
Ham v. South Carolina, 409 U.S. 524 (1973)	7
Sellers v. United States, 271 F. 2d 475 (D.C. Cir. 1959)	7
Severson v. Duff, 322 F.Supp. 4 (M.D. Fla. 1970)	5,6
Terminiello v. City of Chicago, 337 U.S. 1 (1949)	6
United States v. Drevetski, 338 F. Supp. 403 (D Ill. 1972)	11
United States v. Robinson, 14 Cr.L.R. 2088 (3rd Cir. 9/26/73	7
Waller v. Florida, 397 U.S. 387 (1970)	11
Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1952)	10

Statutes

Va. Code Ann. §18.1-253.2 (Cum. Supp. 1972)	2,5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

STEPHEN EARL SQUIRE,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Petitioner prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of Virginia entered on October 8, 1973, affirming an order of conviction and sentencing entered by the Corporation Court of the City of Charlottesville, Virginia on November 15, 1972.

Opinion Below

The opinion of the Supreme Court of Virginia is reported at 214 Va. 260 (1973). It is set forth in the appendix, *infra*, pp. 2a-6a.

Jurisdiction

The judgment of the Supreme Court of Virginia was entered on October 8, 1973. On January , 1974, Mr. Chief Justice Burger extended the time for filing this petition for certiorari to and including February 5, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Questions Presented

1. Whether Virginia's disorderly conduct statute is unconstitutionally vague and overbroad on its face and as applied?

2. Whether a juror who states that he believes that either a police officer or a university official is inherently more credible than an anti-war demonstrator should have been struck by the trial judge for cause?

3. Whether, on a trial de novo, a court of record may hear evidence of alleged offenses of which the defendant was specifically acquitted in the Court not of record below consistent with the double jeopardy clause of the United States Constitution?

Statute Involved

Va. Code Ann. §18.1-253.2 (Cum. Supp. 1972) provides as follows:

> If any person behaves in a riotous or disorderly manner in any street, highway, public building, or any other public place, other than those mentioned in the

preceding section (§18.1-253.1), or causes any unnecessary disturbance in or on any public conveyance, by running through it, climbing through windows or upon the seats, failing to move to another seat when lawfully requested to so move by the operator, otherwise annoying passengers or employees therein, he shall be guilty of a misdemeanor.

Statement of the Case

On April 29, 1972, Petitioner appeared at Scott Stadium on the grounds of the University of Virginia in Charlottesville, Virginia, to engage in a protest against the ROTC program at the University of Virginia. An ROTC parade was scheduled to take place and Petitioner carried a placard saying "In Vietnam we killed millions to avoid a bloodbath," or words to that effect.

A few minutes before the parade was to begin, Petitioner seated himself on the front wall of the stadium and faced the audience with his sign. Dean Alan Williams, Vice President in charge of student affairs at the University of Virginia, approached Petitioner, requested that he leave and tore his placard from his hands. Petitioner attempted to retrieve his placard and a short scuffle ensued. Petitioner was arrested and charged with disorderly conduct.

At his trial in the Municipal Court for the City of Charlottesville, on May 11, 1972, before the Honorable E. C. Wingfield, Petitioner was found guilty. The Court specifically stated that the reason he was guilty was the mere fact that he had carried a sign accusing the military of murder. Petitioner appealed to the Corporation Court of the City of

Charlottesville. On voir dire examination, one prospective juror admitted he believed police officers and university officials were inherently more credible than anti-war demonstrators. The trial judge refused to strike the prospective juror for cause and he sat as a juror during the trial.

Despite Petitioner's timely objection to the constitutionality on federal and state grounds of Virginia's disorderly conduct statute, and his objection to being tried for anything more than displaying his sign, Petitioner was convicted and sentenced to serve a term of four months in jail and to pay a fine of $600.00.

REASONS FOR GRANTING THE WRIT

I.

The Virginia disorderly conduct statute is unconstitutionally vague and overbroad.

Virginia's disorderly conduct statute, *Va. Code Ann.* §18.1-243.2 (Cum. Supp. 1972), raises two substantial constitutional problems in the instant case.

First, on its face and as interpreted by the Supreme Court of Virginia, the statute is vague and overbroad and thus constitutionally invalid. *Connally v. General Construction Company*, 269 U.S. 384, 391 (1931); *Carlson* v. *California*, 310 U.S. 106, 112 (1940).

Virginia's statute makes it a misdemeanor to behave in a "riotous or disorderly manner in any street, highway, public facility or any other public place..." But the statute does not tell us what constitutes riotous or disorderly conduct. This broad statute would be constitutionally suspect without interpretation by the Supreme Court of Virginia. *Severson* v. *Duff*, 322 F. Supp. 4 (M.D. Fla. 1970). The Supreme Court of Virginia, far from limiting the broad and uncertain sweep of the statute, has instead made it more vague. "One can no more undertake to define disorderly conduct than he can misdemeanor, nuisance, police power or insulting words." *Collins* v. *City of Norfolk*, 186 Va. 1, 41 S.E. 2d 448 (1947). Such a non-finding brings the Virginia statute plainly within the rule of *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971).

The Virginia Supreme Court has gone further, however, and found that disorderly conduct is "behavior that tends to corrupt public morals or outrage the sense of decency..." *Hackney* v. *Commonwealth*, 186 Va. 188, 45 S.E. 2d 41 (1941). It is much this kind of standard that this Court found impermissible in *Cohen* v. *California*, 403 U.S. 15 (1971). See also, *Severson* v. *Duff, supra.*

The second problem raised by the statute grows out of Petitioner's attempts to limit the sweep of the statute by jury instructions which would acknowledge the First Amendment problems raised by the case. The Commonwealth of Virginia was granted an instruction defining "disorderly conduct" as "behavior that tends to disrupt public peace and good order." The instruction granted violates the rule that prohibited activity must necessarily rise far above "public inconvenience, annoyance or unrest." *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949). This is especially true since Petitioner offered instructions which would have defined "disorderly conduct" as that which is "turbulent, riotous, or in breach of peace." This instruction was refused by the trial court, as well as other instructions submitted by Petitioner recognizing the First Amendment nature of the case. *Gooding* v. *Wilson*, 405 U.S. 518 (1972).

II.

Juror Bernet should have been struck by the Court for cause.

On voir dire examination, Juror Bernet said that either a police officer or a University official was inherently more credible than an anti-war demonstrator. Although he said later that he could have given Petitioner a fair trial, he should have been struck for cause, since the case directly involved the Petitioner, an anti-war demonstrator, in an act of demonstration against the war in Vietnam.

This Court has ruled that Due Process requires that the defense attorney be permitted to inquire into a juror's potential prejudice against the defendant. *Ham* v. *South Carolina*, 409 U.S. 524 (1973), and the Third Circuit has reaffirmed that this rule must be applied when testing the relative weight to be given to witnesses' testimony. *United States* v. *Robinson*, 14 Cr. L.R. 2088 (3rd Cir. Sept. 26, 1973).

It is well settled in the federal courts that such prejudices must result in the jurors' being struck for cause. *Chavez* v. *United States*, 250 F. 2d 816 (10th Cir. 1968); *Sellers* v. *United States*, 217 F. 2d 475 (D. C. Cir. 1959).

In rebuttal to argument by defense counsel that Juror Bernet should be struck for cause because of prejudice against anti-war demonstrators, the prosecuting attorney stated to the Court:

> I see nothing wrong with a juror who has his prejudices—this is the purpose of having a jury, is to get a cross section of people so that prejudices will be balanced against each other.
>
> Trial Transcript, October 13, 1972, p.7.

This Court must make it clear that, not only may counsel be permitted to probe for such prejudices, but that a defendant is entitled to have prejudices cured by striking for cause.

III.

The failure of the Court of record to exclude evidence of the behavior of which petitioner had been acquitted in the Court not of record is a violation of the doctrine of collateral estoppel as embodied in the principle of double jeopardy.

In his trial on May 11, 1972, in the Municipal Court for the City of Charlottesville, Petitioner was convicted of disorderly conduct. In announcing his decision from the bench, the judge, the Honorable E.C. Wingfield, stated the following findings of fact, and conclusions of law supporting his finding of guilt.

> COURT: I might say this, there is a lot of evidence in here that has been relevant and a lot of it has been irrelevant but I'm drawn to this conclusion from these facts. There was a sign that said either "kill" or "murder" and murder is a right serious word. To display a sign in a place that people have got to look at it, accusing the military of murder is very likely to cause some disturbance. It is calculated to cause some disturbance and to place it in a position where people are bound to look at it, they can't help but see it instead of seeing what they came there to see, it is forcing your opinion on somebody else and doing it in a manner that is likely to cause disturbance and I think anything that is likely to cause disturbance is pretty apt to be disorderly conduct. As I said before, I think the Court can draw conclusions on what evidence you've got before you and the relevant undisputed evidence in this case is this. That this Defendant carried this sign and he doesn't know exactly but it probably con-

tained the word "murder"—at a particular place and the manner in which he displayed it not only was likely to cause disturbance, but did cause a disturbance and that is the issue here. It was more than apt to bring about a riot. You have got to consider not only what took place but where it took place and under what circumstances it took place. *So for those reasons* I find him guilty and I'll put a fine of $25.00 and I'm going to give him a jail sentence of six months. The Commonwealth has asked if I give him a jail sentence that it be suspended. I'm going to suspend it and I'm going to suspend it only on the condition that he pay the fine and costs and good behavior for 12 months. (emphasis supplied)

Trial Transcript, May 11, 1972, pp. 173-174.

The unconstitutionality of the Municipal Court's decision is well settled. *Cohen* v. *California*, 403 U.S. 151 (1971). But in order to attack it, Petitioner was forced to appeal to the Corporation Court for the City of Charlottesville and subject himself to further jeopardy in the form of trial de novo, despite the fact that his Municipal Court conviction was indisputably invalid. This Court has recently held that an unconstitutional blemish in a court not of record cannot be cured by the tardy application of constitutional grease paint on trial de novo in a court of record. *Ward* v. *Village of Monroeville, Ohio*, 409 U.S. 57 (1972).

Additionally, the Commonwealth is estopped from bringing evidence which proves facts of which Petitioner was acquitted in his first trial by the rule of collateral estoppel. The parties are the same in both cases and the issue is the same.

It is of course well settled that the doctrine of collateral estoppel is embodied in the double jeopardy clause of the Fifth Amendment to the Constitution of the United States. *Ashe* v. *Swenson*, 397 U.S. 436 (1970). This protection is given to the citizens of the state by the Fourteenth Amendment. *Waller* v. *Florida*, 397 U.S. 387 (1970), *rehearing denied*, 398 U.S. 914 (1970). Retrial of issues adjudicated in the previous trial is an essential element of double jeopardy protection as is the prohibition of retrial for the same offense. *U.S.* v. *Drevetski*, 338 F. Supp. 403 (D.Ill. 1972); *Ashe* v. *Swenson, supra.*

Petitioner had been acquitted of all conduct except the conduct of display of his sign and he was entitled to be retried only for the allegedly criminal conduct for which he had been convicted by the judge below. *Galloway* v. *Beto*, 421 F.2d 284 (5th Cir. 1970), *cert den*. 400 U.S. 912 (1970).

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be granted.

Respectfully submitted

JOHN C. LOWE
American Civil Liberties Union
of Virginia
1111 West Main Street
Charlottesville, Virginia 22903

F. GUTHRIE GORDON, III
Lowe and Gordon
1111 West Main Street
Charlottesville, Virginia

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union
Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Petitioner

February 1974